No. 12-16980

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BLACK MESA WATER COALITION, *et al.*, Plaintiffs/Appellants,

v.

KENNETH LEE SALAZAR, in his official capacity as U.S. Secretary of the Interior, Defendant-Appellee.

On Appeal from the United States District Court
for the District of Arizona

APPELLANTS' OPENING BRIEF

Submitted January 18, 2013

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure Rule 26.1, Appellants now state that they are not-for-profit conservation organizations that do not have parent corporations or issue stock, so no publicly held corporation owns 10% or more of any of their stock.

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JURISDICTION

(A) The district court had jurisdiction pursuant to 30 U.S.C. § 1276(a)(2), which provides for review of a decision by the Secretary of Interior in a proceeding involving the Surface Mining Control and Reclamation Act, 30 U.S.C. §§ 1201-1328 ("SMCRA"), and/or 28 U.S.C. § 1331, review of a final agency action, along with 5 U.S.C. §§ 702-703, judicial review provision of the Administrative Procedure Act. ER 333-335.

(B) The Court of Appeals has jurisdiction pursuant to 28 U.S.C. §1291, appeal of a final decision of a United States district court.

(C) Plaintiffs appeal the district court's final Order entered July 11, 2012. ER 1. Plaintiffs filed their notice of appeal on September 6, 2012, making it timely pursuant to Fed. R. App. P. 4(a)(1)(B), as a federal agency is a party to this case and the notice of appeal was filed within 60 days of the district court's final order. ER 55.

(D) This appeal is from a final order that disposes of all parties' claims.

ISSUE PRESENTED

Whether the U.S. Secretary of Interior erred by refusing the Plaintiffs' petition for an award of expenses, including expert and attorney fees, under the Surface Mining Control and Reclamation Act, incurred during the Plaintiffs' extensive participation in an administrative appeal brought under SMCRA, where the relief sought by the Plaintiffs was granted, simply because the administrative appeal was decided on the basis of an appeal brought by another set of administrative appellants, rendering Plaintiffs' administrative appeal moot?

REPRODUCTION OF RELEVANT STATUTORY PROVISIONS

The attorney fee provision of SMCRA, and its implementing regulations, are reproduced at pages 12-13 below.

STATEMENT OF THE CASE

This appeal seeks reversal of the district court's decision upholding the Secretary's denial of a petition for an award of costs and expenses, including reasonable attorney fees, incurred during the successful participation of the Plaintiffs Black Mesa Water Coalition *et al.* (collectively, "BMWC") in a formal administrative appeal before the

U.S. Department of Interior's Office of Hearings and Appeals ("OHA"). *See* ER 1-54.

After review of a voluminous administrative record, discovery, extensive motions practice and coordinated summary decision briefing in consolidated proceedings before the OHA, an Administrative Law Judge ("ALJ") for the OHA granted the relief sought by BMWC on appeal and ordered vacatur and remand of a significant permit revision issued by the Secretary of Interior through the Federal Office of Surface Mining Reclamation and Enforcement ("OSM") for Peabody Western Coal Company's Black Mesa and Kayenta coal mine operations located on tribal trust lands in northeastern Arizona. ER 204. However, the ALJ made this decision on the basis of an appeal brought by another set of administrative appellants, Kendall Nutumya *et al.*, which the ALJ determined made BMWC's appeal moot. ER 242, 306. Thereafter, BMWC sought recovery of fees and costs and as provided by SMCRA. ER 75.

The Secretary, acting through the OHA and then on appeal through the Interior Board of Law Appeals ("IBLA"), denied BMWC's fees and costs on the grounds that BMWC was neither "eligible" for

(achieved at least some degree of success on the merits), nor "entitled" to (made a substantial contribution to a full and fair determination of the issues), fees and costs under SMCRA's fee shifting provisions. ER 7-54. The ALJ and the IBLA made this decision on the basis that BMWC's appeal was rendered moot by the ALJ's decision in favor of Nutumya, since the vacatur and remand order granted the relief sought by BMWC. *Id.*

On appeal to the district court, the court upheld the decision of the IBLA which had upheld the decision of the ALJ, on the basis of the eligibility test alone. ER 1. BMWC now appeals these decisions.

STATEMENT OF FACTS

BMWC consists of Navajo and non-native community and conservation organizations. ER 335-339. BMWC's claim for fees and costs stems from BMWC's administrative challenge to OSM's decision to approve an application for revision of the surface mining permit allowing Peabody Coal to operate the Black Mesa and Kayenta surface mines, large surface coal mines located on tribal lands in Northeast Arizona, jointly under a single Life-of-Mine ("LOM") permit. ER 1-2.

On January 20, 2009, BMWC initiated its challenge to the Life-of-Mine permit by filing a Request for Review with the OHA. ER 271. Among other things, BMWC alleged that OSM violated the National Environmental Policy Act, 42 U.S.C. § 4321 *et seq.* ("NEPA"), by failing to identify a new underlying purpose and need for the mine project, by failing to analyze relevant alternatives, and by failing to prepare supplemental NEPA analysis. ER 295-96. Specifically, BMWC alleged that:

> OSM failed to supplement or revise its analysis to address the amended LOM application. OSM failed to identify a new purpose and need based on the amended LOM application. OSM failed to identify relevant alternatives based on the amended Life-of-Mine application. OSM failed to evaluate a reasonable range of alternatives including, but not limited to, alternatives submitted by Appellants.

ER 296 ¶ 99. BMWC was the only appellant to raise claims regarding NEPA supplementation and purpose and need in its Request for Review. Another set of parties to the administrative appeal of the approval of Peabody's 's permit application, Nutumya *et al.*, did not raise this issue in its Request for Review. ER 306-322.

Prior to the decision of the Secretary to approve the LOM permit and the appeal just discussed, there was a public comment period on

the draft environmental impact statement ("EIS") in which BMWC participated. *See* ER 166. Among other things, BMWC commented not only on the need for NEPA supplementation and purpose and need (ER 169-171), but on the lack of adequate alternatives in the draft EIS. ER 175-179. BMWC was the only party to raise these issues regarding alternatives in public comments.

The ALJ consolidated BMWC's appeal with other appeals challenging OSM's permitting decision "because they involve[d] common questions of law or fact." ER 261. After review of a voluminous administrative record and close of discovery, BMWC and Nutumya sought summary decision. ER 209-212. BMWC filed three motions for summary decision under NEPA, SMCRA and the Endangered Species Act, 16 U.S.C. § 1531 *et seq.*. ER 212. Nutumya filed two motions for summary decision under NEPA and SMCRA. ER 211. None of the other parties who filed a Request for Review filed substantive motions. ER 209-212.

BMWC and Nutumya conducted a "coordinated approach" to briefing that included "direct coordination on Nutumya's motion for summary decision based on OSM's violation of NEPA." ER 71, citing,

inter alia, ER 119. This coordinated approach included dividing up the arguments that each set of petitioners would make in order to avoid duplication, with BMWC agreeing that it made more sense structurally for Nutumya to make NEPA arguments related to the need for supplemental NEPA documentation and purpose and need, even though BMWC was the only set of appellants to raise it in their Petition for Review, and also regarding the need for a better NEPA alternatives analysis, even though BMWC was the only party to raise this issue during the public comment period. *See* ER 119. Additionally, Nutumya used BMWC's discovery in its motions for summary decision on these issues. ER 81.

The ALJ singled out and granted Nutumya's motion for summary decision on NEPA grounds, holding that OSM violated NEPA by, among other things, failing to prepare a supplemental NEPA analysis and by failing to include an adequate range of alternatives. ER 238-239. In so doing, the ALJ found that "[t]he result [BMWC] sought- vacatur of the OSM decision- has been granted." ER 240. The ALJ declined to address the merits of BMWC's summary decision motions, instead denying them as moot. *Id.* No party appealed the ALJ's final order on

the merits. ER 34.

BMWC timely petitioned the ALJ for an award of $206,453.86 from OSM in costs and expenses, including attorneys' fees and expert fees, reasonably incurred as a result of BMWC's participation in the appeal. ER 75. In response, OSM filed a "Motion to Dismiss" BMWC's petition, essentially an opposition to the petition, challenging BMWC's "eligibility" and "entitlement" to an award of attorneys' fees and costs. ER 62. While OSM made a conclusory argument that "BMWC has not established how it would justify an award of fees and costs from OSM in the amount of $221,895.86," and stated that it "may address this issue in another response to BMWC," it never made any substantive arguments challenging the amount claimed by BMWC. ER 71.

On May 28, 2010, the ALJ granted OSM's Motion to Dismiss and dismissed BMWC's fee petition. ER 26.[1] Specifically, the ALJ held that

[1] Nutumya sought a cost and fee award, although that was addressed by the ALJ in a separate order that is not part of the administrative record in this case. *See* ER 29. It is the undersigned's understanding that Nutumya received a cost and fee award from the ALJ, that Nutumya appealed the amount it was granted to the IBLA, and that the OSM and Nutumya settled on an amount during that proceeding.

BMWC was neither "eligible" nor "entitled" to recovery of fees and costs under SMCRA, because he had only ruled on Nutumya's motions for summary decision, not on BMWC's motions, since they were declared moot. ER 37-48, 51. On appeal to the IBLA, that board affirmed on the same grounds. ER 7.

On appeal to the district court, it upheld the Secretary's "entitlement" determination under SMCRA and elected not to reach the Secretary's "eligibility" determination. ER 6. BMWC now appeals.

SUMMARY OF ARGUMENT

Under SMCRA, a fee petitioner must satisfy two requirements in order to successfully recover fees and costs from the Secretary: first, the petitioner must satisfy what is called the "eligibility requirement" (achieving at least some degree of success on the merits); and, second, the petitioner must satisfy what is called the "entitlement requirement" (making a substantial contribution to a full and fair determination of the issues). *West Va. Highlands Conservancy, Inc. v. Kempthorne*, 569 F.3d 147, 154 (4th Cir. 2009) ("*Kempthorne*"). BMWC meets both tests.

First, BMWC achieved some degree of success on the merits and is therefore "eligible" for attorneys' fees and costs under SMCRA,

because the relief sought by BMWC, vacatur and remand, was expressly granted by the ALJ. This is the governing test for the eligibility requirement under applicable court precedent. The ALJ and IBLA's finding that BMWC was not eligible for costs and fees because the ALJ never reached their summary decision motions failed to apply this proper standard.

Second, BMWC is "entitled" to a cost and fee award because it made a substantial contribution to a full and fair determination of the issues before the ALJ in the consolidated appeals. It met this test regardless of whether a "but-for" causal test is applied, since the issues BMWC raised during the public comment period and in its Request for Review were necessary to preserve the issues that led to the vacatur and remand based on Nutumya's summary decision motions. Further, applicable case law shows that a strict "but-for" test is overly restrictive, and instead a more generous substantial contribution test is applicable, whereby BMWC's extensive involvement in the appeal, including coordination with Nutumya on the summary decision motions in order to avoid duplication of arguments, makes it clear that they are entitled to a cost and fee award.

Finally, the amount of BMWC's claims for costs and expenses was uncontested in the proceedings below. For this reason, BMWC respectfully requests that the Court direct the district court to accept BMWC's claim for $226,333.53 in fees and costs for work on the administrative proceedings below, plus an amount for the subsequent litigation as yet to be determined.

ARGUMENT

I. Reviewability and Standard of Review

The sole issue in this appeal was raised administratively in BMWC's petition for a cost and fee award before the OHA (ER 75), in the Secretary's motion to dismiss that petition (ER 62), and was resolved in the decision by the OHA (ER 26) and on appeal by the IBLA (ER 7). It was raised in the district court by BMWC's complaint (ER 332) and brief (CR 28), the Secretary's answer (ER 323) and response brief (CR 29), and resolved by the final order of the district court (ER 1).

The Court reviews the district court's award or denial of attorney's fees for abuse of discretion. *St. John's Organic Farm v. Gem County Mosquito Abatement Dist.*, 574 F.3d 1054, 1058 (9th Cir. 2009)

(citation omitted). "Under this standard, we review the district court's factual findings for clear error and review *de novo* its legal analysis." *Id.* As there are no significant factual disputes presented here, "[t]he principal issues in this case are legal in nature and therefore reviewed *de novo*." *Harris v. Maricopa County Superior Court*, 631 F.3d 963, 970 (9th Cir. 2011) (attorney fee dispute).

The underlying standard of review of the OHA and IBLA decisions is *de novo* for the "eligibility" prong of the SMCRA cost and fee provision and for an abuse of discretion on the "entitlement" prong. *West Va. Highlands Conservancy, Inc. v. Norton*, 343 F.3d 239, 245-46, 248 (4th Cir. 2003) *("Norton").* But again, because resolution of the entitlement prong relies on legal issues in this particular case, they should also be reviewed *de novo* here. *Harris*, 631 F.3d at 970.

II. BMWC is Entitled to an Award of Fees and Costs

A. Standards for an Award of Attorneys Fees and Costs under SMCRA

The fee award provisions of SMCRA contain the broadest type of language found in fee-shifting statutes. Section 525(e) of the statute provides that:

> Whenever an order is issued under this section, or a result of any administrative proceeding under this Act, at the request of any person, a sum equal to the aggregate amount of all costs and expenses (including attorney fees) as determined by the Secretary to have been reasonably incurred by such person for or in connection with his participation in such proceedings, including any judicial review of agency actions, may be assessed against either party as the court, resulting from judicial review or the Secretary, resulting from administrative proceedings, deems proper.

30 U.S.C. § 1275(e). By its express terms, Section 525(e) directs the Secretary to award costs and expenses incurred for participation in actions for administrative review.

By regulation the Secretary has clarified this statutory requirement, requiring that the fee applicant must have "prevail[ed] in whole or in part, achieving at least some degree of success on the merits, upon a finding that such person made a substantial contribution to a full and fair determination of the issues." 43 C.F.R. § 4.1294(b). "The fee petitioner must thus satisfy two requirements under the regulation: first, what is called the 'eligibility requirement' (achieving at least some degree of success on the merits); and, second, what is called the 'entitlement requirement' (making a substantial contribution to the determination of the issues)." *Norton*, 343 F.3d at 245.

Eligibility and entitlement standards applicable in administrative proceedings under Section 525(e) are analyzed the same as those under fee-shifting statutes in which Congress has authorized the award of fees "whenever the court determines such award appropriate." *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 682 n. 1 (1983); *Norton*, 343 F.3d at 244; *Marbled Murrelet v. Babbitt*, 182 F.3d 1091, 1094 n.1 (9th Cir. 1999); *see also* 50 Fed. Reg. 21,471 (May 24, 1985); 50 Fed. Reg. 47,222 (Nov. 15, 1985).

These standards are more generous than those governing fee eligibility and entitlement under statutes that authorize fee awards only to the "prevailing party." *Ruckelshaus*, 463 U.S. at 688 (interpreting "whenever . . . appropriate" statutes to "expand the class of parties eligible for fee awards"). Under such statutes, citizens may become eligible for, and entitled to, fee awards even if they are only "partially prevailing parties - parties achieving some success, even if not major success." *Ruckelshaus*, 463 U.S. at 688. This includes "litigation which will assure proper implementation and administration [of environmental statutes] or otherwise serve the public interest." *Id.* at 687 (citation omitted).

B. BMWC Achieved Some Degree of Success and so is "Eligible" for Fees and Costs

BMWC achieved some degree of success in the consolidated administrative proceedings below because it received its requested relief, and is therefore eligible for fees and costs, despite that the ALJ granted that relief on the basis of Nutumya's summary decision motions and never reached those filed by BMWC.

While the district court did not reach the eligibility factor because it ruled against BMWC on entitlement (ER 6), the ALJ and the IBLA ruled that BMWC was not eligible for fees because the ALJ only reached Nutumya's merits arguments and that the proceedings were not sufficiently consolidated to accord "success" to BMWC. ER 37-43, 14-15. However, that is not the applicable standard, and because BMWC received the relief it requested, it achieved at least some degree of success on the merits, and so is "eligible" for a cost and fee award.

The relief that BMWC sought was in fact the relief that the ALJ ultimately granted. ER 240 (ALJ merits decision: "The result [BMWC] sought- vacatur of the OSM decision- has been granted"). As the courts have found, this is sufficient to fulfill the eligibility requirement. "An administrative remand . . . that advances an important statutory goal

is sufficient success on the merits to establish eligibility for an award of fees under *Ruckelshaus* and *[National Wildlife Fed'n v. Hanson*, 859 F.2d 313 (4th Cir. 1988)], even when that goal is simply to make sure that an agency fulfills its statutory duties." *Norton*, 343 F.3d at 247; *see also Kempthorne*, 569 F.3d at 151. This true even where, as here, the remand is ordered on *the basis of an argument other than one made by the applicant for fees and costs*.

In *Kempthorne*, the remand order was based on an issue the IBLA raised "on its own initiative," rather than on issues raised by the appellant. 569 F.3d at 150. In ruling that the appellant was eligible for costs and fees, the court held:

> Our determination that WVHC achieved some degree of success is unaffected by the fact that the IBLA's remand order was grounded on an issue that WVHC did not directly press before the Board. "Whenever appropriate" attorneys' fees statutes "eliminate ... the necessity for case-by-case scrutiny by federal courts into whether plaintiffs prevailed 'essentially' on 'central issues,' " or "essentially succeed[ed] in obtaining the relief [they] seek [ ] in [their] claims on the merits." *Ruckelshaus*, 463 U.S. at 688 []. Thus, it is enough here that the IBLA ordered OSM to carry out one of its regulatory duties.

Id. at 154.

Likewise, in *State of New Jersey v. EPA*, the D.C. Circuit found that the applicants were eligible for fees under the Clean Air Act

despite the fact that they were intervenors whose arguments were never reached. 663 F.3d 1279, 1281 (D.C. Cir. 2011) ("*New Jersey*") ("True, we never reached the Tribes' arguments, but that is immaterial. By giving us alternative bases for resolving the case . . . Tribal Intervenors contributed to the proper implementation and administration of the act or otherwise serve[d] the public interest.") (citations omitted, internal quotation marks omitted).

Indeed, this Court's precedents are in accord with these decisions. *Seattle Sch. Dist. No. 1 v. Washington*, 633 F.2d 1338, 1349 (9th Cir.1980), aff'd on other grounds, 458 U.S. 457 (1982) ("To retrospectively deny attorney's fees because an issue is not considered or because a party's participation proves unnecessary would have the effect of discouraging the intervention of what in future cases may be essential parties.").

Yet, the ALJ and the IBLA ruled that BMWC "was not eligible for an award of fees and costs because [the ALJ] dismissed BMWC's request for review without considering the merits of that request, and [] he did not rely on any claim, argument, or error set forth in BMWC's pleadings," since the ALJ resolved the case on the basis of Nutumya's

arguments before reaching BMWC's arguments. ER 20. This reasoning violates the governing standard of eligibility for fee awards. The Secretary's holding that a fee applicant is not eligible to receive an award, simply because an ALJ only addressed another applicant's motions, contradicts the precedent applicable to the eligibility test, and should be reversed on that basis.

Still, it might be argued that a party does not deserve to be reimbursed for its costs and fees, even if it received the relief it requested, if it had not played a significant role in the litigation. The first answer to that argument is that the "substantial contribution" test should be the proper way to guard against that, and it is addressed below. But further, even if considered in the context of eligibility, it cannot be disputed that BMWC did in fact play a significant role in the consolidated appeals, including that Nutumya's arguments could not have prevailed had it not been for the participation of BMWC.

The ALJ addressed the arguments raised by BMWC in its Request for Review, including the supplemental NEPA issue, which Nutumya did not raise in its Request for Review and only briefed due to the coordination by Nutumya and BMWC in order to avoid duplication.

See pp. 5-7, *supra*. Further, BMWC was the only party to raise the NEPA alternatives argument in its public comments on the draft EIS, another ground on which the ALJ ruled in favor of Nutumya, absent which exhaustion defenses could have been raised. *See id.*[2] Thus, absent BMWC's initiation and participation, these issues that provided the basis for the relief granted by the ALJ would not have been properly preserved. BMWC should not be punished for its coordination with Nutumya, which is the result of the ALJ and IBLA's decisions. *See New Jersey*, 663 F.3d at 346 (avoiding duplication and focusing on arguments "petitioners did not and could not make" should be "incentivized," not punished).

Thus, for the Board to hold *post-hoc* that BMWC is ineligible for a fee award solely because BMWC did not file the particular motion for summary decision that the ALJ chose to adjudicate ignores the reality that the ALJ consolidated multiple appeals and then provided relief that satisfied the parallel relief demands voiced in multiple motions for

[2] The district court noted that Nutumya included the alternatives argument in its Petition for Review, but failed to note that Nutumya did not include the supplementation argument that BMWC raised in its Petition for Review. ER 5.

summary decision. As stated by the court in *New Jersey*:

> To retrospectively deny attorney's fees because an issue is not considered or because a party's participation proves unnecessary would have the effect of discouraging the intervention of what in future cases may be essential parties." *Seattle Sch. Dist. No. 1 v. Washington*, 633 F.2d 1338, 1349 (9th Cir.1980), aff'd on other grounds, 458 U.S. 457 [] (1982); *see also [American Petroleum Inst. v. EPA*, 72 F.3d 907, 912 (D.C. Cir.1996)] ("It is not necessary that a fee-petitioning client and its attorney have acted with the 20/20 acuity of hindsight in developing their arguments in order to collect attorneys' fees.").

New Jersey, 663 F.3d at 1281-82. And that is for an intervenor, let alone for a primary party like BMWC who was the only party to conduct discovery and who was otherwise and least as active a participant in the appeals as Nutumya, if not more.

For these reasons, BMWC is "eligible" for costs and fees.

C. BMWC was "Entitled" to a Cost and Fee Award because it Made a Substantial Contribution to the Determination of the Issues

A party is "entitled" to an award if it "initiate[s] or participate[s] in any proceeding" and make "a substantial contribution to a full and fair determination of the issues." 43 C.F.R. §4.1294(b). BMWC did so here, and so is entitled to a cost and fee award.

The ALJ, IBLA and district court largely ruled that BMWC was not "entitled" to costs and fees for the same reason that BMWC was

deemed "ineligible"- namely that the ALJ never reached BMWC's arguments. ER 4-6, 21-24, 44-47. For this reason, much of the argument in the "eligibility" section above is relevant here and is incorporated by reference. The tribunals below abused their discretion by applying the wrong legal standard, as their findings ultimately rested on finding no entitlement due to the ALJ never reaching BMWC's summary decision motions.

A distinction that could arguably (but does not) make a difference in terms of entitlement versus eligibility is whether the entitlement prong requires a "but-for" causal showing as the ALJ, IBLA, and district court found: but for BMWC's participation, would the ALJ have granted the requested relief? *See* ER 4-5. First, even if that is the governing standard, to be taken in "the totality of the circumstances" (ER 4, citation omitted), as discussed above Nutumya's NEPA supplementation and alternatives arguments could not have been made without BMWC preserving those issues in their public comments and Request for Review. *See* pp. 5-6, 18-19, *supra*. And further, if it had not been for consolidation of the appeals and BMWC's agreement with Nutumya to divide up the arguments, BMWC would in fact have made

those arguments as evidenced by its raising them in its comments and request for review.

Second, a strict "but-for" causal showing should not be required. As addressed above, the Supreme Court and other courts have ruled that SMCRA's fee provision is to be interpreted broadly, in line with statutes that contain a "whenever appropriate" standard. *See* p. 14, *supra*. As courts construing such provisions have ruled, it is "appropriate" to award costs and fees even where, as here, an applicant's arguments were never reached but where their participation was integral (even as an intervenor) to the proceedings. *See, e.g., New Jersey*, 663 F.3d at 1281-82. Other statutes utilizing the "whenever appropriate" standard have no bifurcated "eligibility" and "entitlement" requirement, but all involve whether a party made a "substantial contribution" to the litigation, which courts like *New Jersey*, *Kempthorne* and *Seattle Sch. Dist.* have answered in the affirmative in cases like this where a party is actively involved in a proceeding but its arguments are never reached because its requested relief was granted on other grounds. That being the case, while a but-for causal connection could certainly *prove* "substantial contribution,"

the absence of one cannot *disprove* it if the totality of circumstances shows that a party made a substantial contribution to a case.

BMWC meets this standard. BMWC's participation in the administrative appeal was extensive, as already discussed. BMWC spent considerable time reviewing the record and conducting discovery, and hired experts to review the record. ER 84-86. Thereafter, BMWC contributed substantially to the tribunal's understanding by, among things, filing three separate motions for summary decision, without duplicating the arguments of Nutumya, in an effort to resolve this matter expeditiously and without the need for a hearing. ER 212.[3] Denying BMWC its costs and fees would discourage a coordinated approach to SMCRA appeals where multiple appellant groups are involved, and improperly punishes BMWC for doing so here.

[3] The ALJ's & IBLA's focus on the small number of hours that BMWC and Nutumya spent coordinating their arguments to avoid duplication misses the point- it was the mere fact of the coordination that led to having Nutumya press the arguments ultimately addressed by the ALJ that matters, as that is what led to BMWC not duplicating those arguments. *See* ER 21-22. That such coordination took a relatively small number of hours is irrelevant to whether BMWC is entitled to receive costs and fees for its work on the case, including for arguments that the ALJ never reached.

The legislative history of SMCRA makes special note that the statute's administrative fee-shifting provision "does not require that the proceedings [for which fees are awarded] result in the finding of a violation." H.R. Rep. No. 218, 95th Cong. 1st Sess. 131 (1977). More importantly, the legislative history emphasizes Congress's "intention that this subsection not be interpreted or applied in a manner that would discourage good faith actions on the part of interested citizens." *Id*. The approach taken by the tribunals below does just that.

Allowing fee shifting only where an appellant directly affected the outcome of a case, as determined after the fact, has been recognized by this Court as discouraging participation in good faith legal actions, even in the context of intervention. "It is usually impossible to determine in advance of trial which issues will be reached or which parties will play pivotal roles in the course of the litigation. To retrospectively deny attorney's fees because an issue is not considered or because a party's participation proves unnecessary would have the effect of discouraging the intervention of what in future cases may be essential parties." *Seattle Sch. Dist. No. 1*, 633 F.2d at 1349; *see also American Petroleum Inst.*, 72 F.3d at 912 ("It is not necessary that a

fee-petitioning client and its attorney have acted with the 20/20 acuity of hindsight in developing their arguments in order to collect attorneys' fees.").

Nothing would do more to discourage interested citizens from bringing good faith actions to enforce SMCRA than to deny the majority of a group of citizen litigants (in this case a broad coalition of primarily Navajo community organizations) recovery of costs and attorney fees whenever an administrative law judge elects to resolve the dispute by adjudicating the summary decision motion of one party in a manner that moots the claims of remaining parties.

And where citizens still did file such appeals, the district court's decision, if allowed to stand, would essentially compel parties to an appeal consolidated by an administrative law judge to duplicate efforts (thereby substantially increasing attorney time and costs, including hiring separate experts) in an effort to ensure that their commonly alleged errors are individually and separately briefed, regardless of the waste of resources involved. That result is not supported by any consideration other than a one-time savings to the OSM in this particular case, and would be vastly outweighed by long-term costs to

OSM in future cases.

For these reasons, because BMWC's participation made a substantial contribution to the administrative appeals below, it is entitled to costs and attorney fees.

D. The Reasonableness of Fees and Costs Requested by BMWC Was Uncontested by the Secretary

The Secretary did not dispute the amount of costs and fees claimed by BMWC before the ALJ, the IBLA, or the district court. The Secretary has therefore waived the ability to contest the reasonableness of the amount claimed by BMWC on appeal. *See Western Medical Enterprises, Inc. v. Heckler*, 783 F.2d 1376, 1379 (9th Cir. 1986) ("As a general rule, we cannot consider on appeal from an agency decision an issue not raised before the agency.") (citing *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952)).

For this reason, BMWC respectfully requests that the Court direct the district court to accept BMWC's claim for $226,333.53 in fees and costs incurred as part of BMWC's participation in the administrative appeal before the ALJ and as set forward in BMWC's fee petition, plus the amount incurred in litigation over costs and fees since that time.

CONCLUSION AND REQUESTED RELIEF

For these reasons, the district court should be reversed, with instructions that the district court accept BMWC's claim for $226,333.53 in fees and costs incurred as part of BMWC's participation in the administrative appeal before the ALJ, and assess BMWC's fees and cost for work performed in recovery of these costs and fees since that time.

RESPECTFULLY SUBMITTED January 18, 2013.

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STATEMENT OF RELATED CASES

There are no prior or related appeals in this Court.

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION

I certify that this brief is proportionally spaced using a 14-point Century Schoolbook font, and contains 5,046 words, which complies with the requirements of Ninth Circuit Rule 32-4 and Fed. R. App. P. 32(a).

/s/Matt Kenna
Matt Kenna

CERTIFICATE OF SERVICE

I certify that I electronically filed this brief and Appellants' Excerpts of Record with the Clerk of the Court by using the appellate CM/ECF system, on January 18, 2013. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/Matt Kenna
Matt Kenna